SUPREME COURT, U. S.

SEP 18 1968

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 542

ALVAN L. DUGAS,

Petitioner,

versus

STATE OF LOUISIANA

Petition for Writs of Certiorari to the Supreme Court of Louisiana and the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana

SAM J. D'AMICO
610 Reymond Building
Baton Rouge, Louisiana

GORDON M. WHITE
510 Reymond Building
Baton Rouge, Louisiana

Attorneys for Petitioner

Franklin Press, Inc. — Baton Rouge, La.

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May It Please the Court:

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana rendered on the 4th day of June 1968 in *State of Louisiana v. Alvan L. Dugas*, No. 48987 on the docket of said court and the refusal of petitioner's application for rehearing and entry of said

judgment on the 28th day of June, 1968, affirming the decision of the 19th Judicial District Court for the Parish of East Baton Rouge in the matter entitled *State of Louisiana v. Alvan L. Dugas*, No. 19593 on the criminal docket of said court, which proceeding resulted in a finding that petitioner was guilty of the crime of negligent homicide as defined by L.R.S. 14:32.

CITATIONS TO OPINIONS BELOW

The opinions below are not reported. The jury in 19th Judicial District Court for the Parish of East Baton Rouge on the 30th day of March 1965 returned a verdict of guilty as charged, and the Honorable Fred S. LeBlanc, Judge, sentenced petitioner to one year in the East Baton Rouge Parish Jail on the 28th day of June 1966.

The Supreme Court of the State of Louisiana affirmed this decision on the 4th day of June, 1968, and denied petitioner's application for rehearing on the 28th day of June, 1968, which decisions are unreported.

JURISDICTION

The judgment of the Supreme Court of Louisiana was rendered on the 4th day of June, 1968, and petitioner's application for rehearing was denied and judgment entered on the 28th day of June, 1968.

The jurisdiction of this court is invoked under 28 USC Sec. 1257 (3), petitioner claiming rights, privileges, and im-

munities under the 5th and 14th amendments to the Constitution of the United States of America.

QUESTIONS PRESENTED

Whether petitioner was denied due process and equal protection of the laws under the 5th and 14th amendments to the Constitution of the United States of America by the action of the 19th Judicial District Court in allowing testimony to be introduced as to an admission or incriminating statement elicited from petitioner while he was in the hospital under treatment and in pain, where it was not proved by the State to have been freely and voluntarily made.

Whether petitioner was denied due process and equal protection of laws under the 5th and 14th amendments by the 19th Judicial District Court allowing testimony to be introduced during petitioner's trial as to petitioner's refusal to submit voluntarily to a blood test to determine his sobriety.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOKED

1. This case involves the 5th and 14th amendments to the Constitution of the United States.

2. This case also involves Louisiana Constitution, Article 1, Section 2 and Article 1, Section 11 which provide as follows:

> "Section 2. Due process; expropriation of private property for public purposes; just compensation
>
> "No person shall be deprived of life, liberty or property, except by due process of law. Except as otherwise pro-

vided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."

"Section 11. Self-incrimination; confessions

"No person shall be compelled to give evidence against himself in a criminal case or in any proceedings that may subject him to criminal prosecution, except as otherwise provided in this Constitution. No person under arrest shall be subjected to any treatment designed by effect on body or mind to compel confession of crime; nor shall any confession be used against any person accused of crime unless freely and voluntarily made."

STATEMENT

Petitioner, Alvan L. Dugas, seeks a review of his conviction of the crime of negligent homicide in the 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana. Petitioner was charged in said court by an indictment returned by the Grand Jury of the Parish of East Baton Rouge, which was filed in said court on the 6th day of March, 1964. This Bill of Indictment charged petitioner with having on the 3rd day of February, 1964, negligently killed Joe Gail McSwain.

Petitioner was arraigned and entered a plea of not guilty. The trial of this case was completed on the 30th day of March, 1965, with the jury returning a verdict of guilty as charged. On the 28th day of June, 1966, the Honorable Fred S. LeBlanc, Judge of the 19th Judicial District Court, sentenced petitioner to one year in the East Baton Rouge Parish Jail.

Petitioner filed a motion for a new trial and a motion in

arrest of judgment, which, after hearings, were denied by the trial court.

Numerous bills of exceptions were perfected and the judgment was appealed to the Supreme Court of the State of Louisiana.

The Supreme Court affirmed the decision of the trial court and rejected petitioner's contention that his constitutional rights had been violated when the trial court allowed the introduction into evidence of certain admissions or incriminating statements elicited from petitioner while he was in the hospital in pain, and that petitioner's constitutional rights were further violated by the trial court allowing testimony as to petitioner's refusal to voluntarily submit to a blood test to determine his sobriety to be introduced into evidence.

HOW THE FEDERAL QUESTIONS WERE PRESENTED

The Federal questions sought to be reviewed here were raised during the trial of this matter by petitioner's objections to the introduction of certain evidence by the State. The trial court overruled petitioner's objections to which rulings bills of exceptions were reserved and in due course perfected.

The Federal questions were also urged and raised by petitioner in a motion for a new trial and motion in arrest of judgment. Petitioner objected to the denial of said motions and reserved bills of exceptions to the rulings of the trial court.

The bills of exception were tendered to the District

Attorney, to the trial judge and, by appeal, to the Supreme Court of the State of Louisiana to no avail.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court of Louisiana rejected petitioner's plea that his 5th and 14th amendment guarantees were violated when the trial court allowed the introduction into evidence of an incriminating statement or admission elicited by Trooper Leland R. Denson while petitioner was in the hospital in pain. Petitioner had been involved in an accident a short time before said interview and had received certain cuts, abrasions and a severe blow to his head. He was admitted to the hospital and given a sedative by Dr. Moss M. Bannerman who examined him upon his arrival at the emergency ward of the Baton Rouge General Hospital.

Trooper Denson, along with State Police Captain Green, interviewed petitioner immediately after he was removed from the emergency room and placed in a hospital room by Dr. Bannerman. The record clearly shows that at the time of said interview and questioning, petitioner was experiencing pain from his injuries. In this unstable condition, State Trooper Denson elicited the incriminating statements. Petitioner was not advised of his right to counsel, nor was he advised of his absolute constitutional right to remain silent.

The jurisprudence of Louisiana is abundantly clear that confessions, admissions or incriminating statements are treated alike. The State has the burden of proving beyond a reasonable doubt that the confession, admission or incrim-

inating statement was freely and voluntarily made. This was clearly shown in *State v. Graffam*, 202 La. 869, 13 So.2d 249, page 255:

> "It is not enough that the confession was not induced by a promise or threat in order to prove that it was voluntarily made. It is voluntary in law if, and only if, it is voluntary in fact."

State v. Henry, 196 La. 217, 198 So. 910:

> "Under the facts presented by this record, we are constrained to hold that defendant's confession was not freely and voluntarily made. The situation of the defendant, the nature of his wounds, the condition of acute shock from which he was suffering, his weakness resulting from the loss of blood, and the effect of the morphine and other treatment that was administered or being administered to him, necessarily, overthrows any possible implication that his statement to Detective Schwehm in response to the detective's questions could have been the result of a purely voluntary mental action."

The Louisiana Supreme Court in the instant case at page 4 of its opinion stated:

> "As pointed out in Johnson v. New Jersey, supra, the precise holding of *Escobedo* is that statements obtained by police during interrogation may not be used against the defendant at a criminal trial 'where . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out the process of interrogation that lends itself to eliciting incriminating statements, the suspect has requested and has been denied an opportunity to consult with his lawyer, and the police have not effec-

tively warned him of his absolute constitutional right to remain silent . . . ."

Petitioner was the focal point of the police inquiry at all times. It is undisputed as shown by the record that he was never warned of his absolute constitutional right to remain silent nor was he advised of his right to counsel.

Petitioner had been involved in a traffic accident, but did not know that any death had resulted therefrom. The investigating officers who questioned petitioner at the hospital did not advise him that the accident had caused the death of Joe Gail McSwain, nor did they advise him that he was being questioned and investigated concerning a charge of negligent homicide.

The conclusion is inescapable that the incriminating statements elicited from petitioner in the hospital while he was sedated and in pain were not of a voluntary nature.

Without petitioner being advised that his accident resulted in a fatality; that he was the subject of a negligent homicide investigation; that he had the absolute right to remain silent and consult with his attorney before being questioned would seem to force the conclusion that no statement or admission elicited from petitioner under such conditions could have been of a free and voluntary nature. To allow such action does violence to the minimum standards established by this Honorable United States Supreme Court, in its application of the due process and equal protection clauses of the Constitution of the United States of America. Such action also violates Article 1, Section 2 of the Louisiana Constitution which requires that any confession, admission

or incriminating statement must be proved to have been knowingly made, freely and voluntarily, before it is admissible in a criminal trial.

II.

The trial court over petitioner's objection allowed testimony to be introduced that petitioner refused to voluntarily submit to a blood test to determine his sobriety.

The Supreme Court of Louisiana, page 5 of its opinion, stated:

> "Defendant reserved these bills to the admission at the trial of testimony that defendant refused a blood test for intoxication, known as an intoximeter test infringes no constitutional rights. The Fifth Amendment privilege against self-incrimination applies only to 'evidence of a testimonial or communicative nature.'" *Schmerber v. State of California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 908. See also *Breithaupt v. Abram*, 352 U.S. 432, 77 S. Ct. 408, 1 L. Ed. 2d 448.

In the present case, however, after the defendant declined the officers administered no test. Hence, the precise question presented is whether testimony of defendant's refusal to take the intoxication test was admissible at the trial. The question is *res nova* in Louisiana.

Defendant contends the admission of such evidence violates his rights against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution.

The Louisiana Supreme Court took judicial notice of the

fact that this precise question has never been decided by the appellate courts of Louisiana. The trial of this matter was concluded on the 30th day of March, 1965, some months prior to the decision of this Honorable Court of *Schmerber v. State of California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908, which condoned compulsory extraction of blood under certain conditions. It is therefore questionable as to whether compulsory extraction of blood for an intoxication test could have been conducted in Louisiana before this time since it had never been judicially allowed before the *Schmerber* case.

The Attorney General of Louisiana on March 11, 1965, at page 115 of *Reports and Opinions of the Attorney General of Louisiana*, Jack P. F. Gremillion, Attorney General, advised Evarist J. Trahan, M.D., Pathologist, Lakewood Hospital, P. O. Box 917, Morgan City, Louisiana, in substance that evidence of a blood test is inadmissible unless the accused consents to the test; otherwise his constitutional right against self-incrimination is violated.

It must be borne in mind that even though an opinion by the Attorney General of the State of Louisiana is not binding on the courts of Louisiana, the learned opinion of the highest legal officer in the State would be afforded great respect.

Therefore, at the time of petitioner's trial the Attorney General of the State of Louisiana was of the opinion that since he refused to voluntarily submit to the intoximeter test, blood could not be extracted from him for said purpose, and introduced into evidence at his criminal trial.

After this court's holding in *Schmerber v. State of Cali-*

fornia, supra, the Attorney General of Louisiana changed his position, to conform with said holding. *Opinion of Attorney General of Louisiana*, March 1, 1966 to January 1, 1968, Jack P. F. Gremillion, Attorney General, page 90, rendered on January 17, 1967.

This, of course, comes some years after the trial of petitioner. The question of whether testimony should have been admitted of petitioner's refusal to voluntarily submit to the intoximeter test is a complex determination. If the mandate of this court in *Schmerber v. State of California*, supra, was abided by, it is clear that the State of Louisiana could force an accused to submit to a blood test to determine intoxication. This does not answer the question of whether the testimony of a State law enforcement officer is admissible into evidence as to an accused's refusal to voluntarily submit to a blood test where said officer had the accused in a hospital and did not force him to submit to such a test to determine his sobriety.

This question involves not only petitioner's 5th amendment privilege against self-incrimination, but also involves petitioner's 14th amendment privilege and right to be afforded due process of law. These rights and privileges would forbid a District Attorney from commenting on an accused's failure to take the witness stand, as this court has held on numerous occasions. This proposition is so well established that citations are omitted.

The United States Fifth Circuit Court of Appeals in *Baker v. U.S.*, 357 Fed. 2d , at page 13 states:

". . . to have proven, appellant requested the right of

counsel and thereafter made no further statement was, we feel, as objectionable as it would have been to comment on defendant exercising his constitutional right not to take the witness stand." Also see *Brown v. H. E. White*, 277 Fed. Supp. 899.

The testimony that petitioner declined to take the intoximeter test served no valid purpose other than to prejudice him in the eyes of the jury.

The state had the right to force petitioner to submit to the intoximeter test under the holding of *Schmerber v. State of California*, supra, and the state, not petitioner, chose not to exercise this right.

Petitioner should not have been prejudiced because of the State's choice.

Since the question of whether testimony of a defendant's refusal to voluntarily submit to the taking of his blood for an intoxication test was admitted by the Louisiana Supreme Court to be *res nova*, the jurisprudence of other states was examined in an attempt to ascertain how other states have decided this question.

The following cases are submitted to this Honorable Court to show that certain state courts have held such testimony to be inadmissible.

Hovious v. Riley, 403 SW 2d 17 (Ky.—1966)

Gottschalk v. Sueppel, 258 Iowa 1173, 140 NW 2d 868 (1966)

Crawley v. State, 413 SW 2d 370

Jackson v. State, 397 P 2d 920

People v. Reeder, 370 Mich. 378, 121 NW 2d 840

Duckworth v. State, 309 P 2d 1103

State v. Severson, 75 NW 2d 316

People v. Stratton, 286 App Div. 323, 143 NYS 2d 362

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Engler v. State, 316 P 2d 625

State v. Simonsen, 252 Minn. 315, 89 NW 2d 910

Cardwell v. State, 156 Tex. Crim. 457, 243 SW 2d 702

Saunders v. State, 353 SW 2d 419

Stuart v. District of Columbia, 157 A 2d 294

State v. McCarthy, 104 NW 2d 673

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari be granted by this Honorable Court.

Respectfully submitted,

D'AMICO & CURET

by_____

SAM J. D'AMICO
610 Reymond Building
Baton Rouge, Louisiana

WHITE & MAY

by_____

GORDON M. WHITE
510 Reymond Biulding
Baton Rouge, Louisiana

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing petition has been served on 1) Honorable Sargent Pitcher, Jr., District Attorney, Parish of East Baton Rouge, Louisiana; 2) The 19th Judicial District Court for the Parish of East Baton Rouge, Louisiana and, 3) the Supreme Court of the State of Louisiana by depositing same in the U. S. mail, with first class postage prepaid, and properly addressed to the respective addresses.

Baton Rouge, Louisiana, this _____ day of September, 1968.

_____

Sam J. D'Amico

_____

Gordon M. White